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# In the Supreme Court of the United States

OCTOBER TERM, 1972

**No. 72-6520**

KINNEY KINMAN LAU, et al.,
*Petitioners,*

vs.

ALAN H. NICHOLS, et al.,
*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## Brief Amicus Curiae of the Childhood and Government Project in Support of Petitioner Children

We present this brief in support of petitioner children with the consent of the parties pursuant to Supreme Court Rule 42. Copies of letters of consent are filed herewith.

### INTEREST OF AMICUS CURIAE AND STATEMENT OF THE CASE

The Childhood and Government Project of the Earl Warren Legal Institute, The School of Law, University of California,

Berkeley, California, was established in 1972. Its concern is with governmental policy—particularly educational policy—which affects children's rights to a meaningful life and to equality. The Project is funded by The Ford Foundation and the Carnegie Corporation.

At stake in this case is equality of educational opportunity for children faced with special barriers arising out of their race, ethnicity, and ancestry. Specifically, this case challenges the asserted "neutrality" of offering a public education program only in the English language when no affirmative steps are taken to integrate into such program a class of children, who, because of their ancestry, are unable to speak, write, or comprehend the prevailing means of communication in the classroom.

This is a class action on behalf of children who physically attend the public schools of the San Francisco Unified School District and who speak Chinese, but not English. Defendants have admitted and the district court found that there are a substantial number of such Chinese-speaking children who need special help in English but who receive no such help at all.

Contrary to what the courts below suggest, the injury in this case is clearly not the fault of petitioner children. They are caught between a home that can't teach them English and a school that won't. The modest proposition they assert is that non-English speaking children may look to the public schools to teach them to speak English. These children are very clearly among those whom the Childhood and Government Project was organized to assist.

## SUMMARY OF ARGUMENT

Both the District Court and the majority of the Court of Appeals below have evaded the constitutional infirmity in this case by finding that Chinese-speaking children are admitted to school and are receiving "the same" instruction as all other students. This view is unrealistic. It fails to take into account the nature of education, which is nothing if it is not communication. The

courts below are only half right. The bodies of these Chinese-speaking students have been admitted to school. Their minds and spirit have been excluded because they do not speak the language of the classroom.

Plaintiff school children could not be denied admission to the public schools because of their race or ancestry. Nor, we submit, could plaintiff school children be denied admission to public school because they do not speak English. Of similar effect would be a school district regulation that said: You may come to class, but you may not participate because you do not speak English. Yet in reality, this is precisely what defendant school district has done here. Plaintiff, Chinese-speaking school children, do not have a disability. They have a cultural characteristic. By failing to take this characteristic into account and not offer special help in English, when its educational program is offered only in English, defendant School District has converted this characteristic into a functional disqualification.

This functional disqualification has been recognized by Congress and led to the adoption of Title VII of the Elementary and Secondary Education Act, 20 U.S.C. § 880b. It has also been recognized by the U.S. Department of Health, Education and Welfare and led to the promulagation on May 25, 1970 of the following guideline pursuant to Title VI of the Civil Rights Act of 1964 (Section 601, 42 U.S.C. § 2000(d)):

> "Where inability to speak and understand the English language excludes national origin-minority children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students." 35 Fed. Reg. 11595, July 18, 1970.

When the state has undertaken to provide public education, it may not effectively deny it to some children on account of a

factor that is inextricably tied to their foreign lineage without violating the Equal Protection Clause of the Fourteenth Amendment.

Part I of this brief addresses the general problem of the functional exclusion from public education of non-English speaking children. Part II addresses the unconstitutionality of such exclusion. Part III addresses the unconstitutionality of defendants' conduct in this case.

## ARGUMENT

### I. A School District Effectively Denies Public Education to Non-English Speaking Children When It Offers Its Educational Program in English And Takes No Affirmative Steps to Integrate Such Children into That Program.

If a school district were to require children to speak English before they were permitted to attend public school, the effect would be to deny public education to non-English speaking children. The exclusion need not be so blatant, however; children may be just as effectively denied public education even though they are admitted to the classroom. This would happen, for example, if the district's teachers followed a policy of not calling on or speaking to children who had Chinese names. Communication between teacher and child is the essence of education, and students who are left out are simply not receiving that communication.

Similarly, non-English speaking children are left out when the school district teaches in English and fails to take into account the fact that they do not comprehend what is being taught. If no affirmative steps are taken to integregate non-English speaking children into the district's educational program, then despite their presence they truly are cut off from that communication which comprises education. If anything, they are educationally worse off than those with Chinese names in the hypothetical suggested above; the latter, although ignored, could at least understand what

was being said. Contrary to what the majority in the Ninth Circuit below suggests, placing a child who does not speak English in a classroom is different from placing a child who is hungry or ill clothed in that same classroom. While the lack of proper food and clothing may hamper learning, the lack of the ability to speak the language is tantamount to a total deprivation.

Assuming the motives of classroom teachers are benign, non-English speaking children nevertheless are going to be effectively excluded from participation in the school's educational program. Assume that a non-English speaking child is the only one, or one of a few, in a class, the rest of whose members do speak English. Assume further that the teacher is assigned to teach reading, speaks only English, and has been given no training in how to communicate with non-English speaking children. That the education of such child or children would be largely ignored is hardly surprising. Sadly, this all too often occurs.

That this plight is a reality for many children in America today is amply demonstrated by Congressional findings which led to the adoption of Title VII of the Elementary and Secondary Act; it also led the Department of Health Education and Welfare on May 25, 1970 to promulgate guidelines pursuant to Title VI of the Civil Rights Act of 1964 mandating that affirmative steps be taken to rectify this situation.[1]

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1. Title VII of the Elementary and Secondary Act of 1965 provides in part "The Congress hereby finds that one of the most acute educational problems in the United States is that which involves millions of children of limited English-speaking ability because they come from environments where the dominant language is other than English; that additional efforts be made to supplement present attempts to find adequate and constructive solutions to meet this unique and perplexing educational situation . . ." (81 Stat. 816 § 701).

See generally, U.S. Department of Health, Education and Welfare (Office of Education); "Draft: Five Year Plan 1972-1977: Bilingual Education Programs, Appendix B" (August 24, 1971). See also testimony in Hearings on S. 428 before the Special Subcommittee on Bilingual Education of the Senate Committee on Labor and Public Welfare, 90th Cong., 1st Sess., 51-55 (1967).

The functional exclusion of non-English speaking children from participation in the school's educational program is not the only injury that they experience. They are stigmatized and isolated. Daily, the child is made to feel inadequate because of his inability to learn. A sense of moral blame is cast upon him by the state. In addition, his language barriers isolate him from his fellow students, depriving him of a sense of belonging.

What is so deplorable about such effective exclusion of non-English speaking children is that there are known and effective techniques which are available to deal with this condition. When such affirmative steps are not taken, however, the condition of these children, who are compelled to attend and then are functionally excluded, is little different from those who would be barred at the schoolhouse door.

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For a history of HEW's May 25, 1970 guideline, see "Project Report: De Jure Segregation of Chicanos in Texas Schools," 7 Harv. Civ. Rts.—Civ. Lib. L. Rev. 307, 365-372 (1972). Additionally, the guideline cites concerns which are explicitly related to deficiencies in English language skills of national orgin group children. Specific deterimental effects include inability to effectively participate in the full educational program, assignments in classes for the mentally retarded, and tracking or ability grouping systems. (35 Fed. Reg. 11595, July 18, 1970).

## II. Children Are Denied Equal Protection of the Laws When They are Effectively Denied Public Education on Account of a Factor Inextricably Tied to Their Ancestry, Namely, Their Inability to Speak English.[2]

(1) When a school district fails to take affirmative steps to integrate non-English speaking children into its educational program it discriminates against them. English speaking youngsters are given public education, while their non-English speaking counterparts are not. The suggestion of the majority below that the requisite "state action" is missing is simply wrong. Knowing of the existence in the district of non-English speaking children, the decision to offer only a regular program taught only in English is the action which harms such children.

The majority below observes that "every student brings to the starting line of his educational career different advantages and disadvantages . . ." which may affect his educational career "apart from any contribution by the school system." 472 F.2d 909 (9th Cir. 1973) at p. 915. It is wrong, however, to suggest that there is no "contribution" by the school system when the system elects, using the Ninth Circuit's metaphor, to run the race only in English. That is, the majority below falls into the trap of concluding that a school district's decision to offer only a regular program and offer it only in English, is unchallengeable. In the face of the known cultural characteristic of some of its pupils, this state policy, however, is the central factor contributing to

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2. We have intentionally adopted as the expression of the relevant constitutional principle, the language of the guidelines promulgated on May 25, 1970 by the U.S. Department of Health, Education and Welfare (35 Fed. Reg. 11595, July 18, 1970), to implement Title VI of the Civil Rights Act of 1964. We believe that the statutory guideline aptly captures the constitutional norm. In view of this identity of principles, the arguments we make here are equally supportive of the *statutory* theory of petitioners; they are seeking relief under Title VI of the Civil Rights Act of 1964, since defendants, who receive federal financial assistance, have discriminated against them and have excluded them from effective participation in and the benefits of defendant's educational program on the grounds of national origin.

educational failure; state action is involved.[3] To suggest that there is no state action here is to say that there is no state action when there is required by law a filing fee for candidates for public office[4] or a residency requirement for seekers of welfare;[5] but there clearly has been held to be the requisite state action in such cases.

**(2) Public education discrimination based upon ancestry is invidious, and victims of such discrimination need judicial remedies.** Most children in America do speak English by the time they go to school. However, there is a "discrete and insular minority"[6] which does not; this minority is almost wholly comprised of children whose home language is not English and whose ancestors come from foreign countries.[7] It is invidious to deny public education to children who are from, or whose ancestors are from, a foreign country because of a condition inextricably tied up with such foreign origin. What a child learns is the language of the home; a policy of teaching only in English and offering no help in English is inherently calculated to place a hurdle in front of such a minority.[8]

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3. In *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), state neutrality was urged as a defense. The state allowed the effects of private discrimination to take place, even though it neither compelled nor condoned the result. This Court held that the state's failure affirmatively to remedy the private discrimination was state action.

4. *Bullock v. Carter*, 405 U.S. 134 (1972).

5. *Shapiro v. Thompson*, 394 U.S. 618 (1969).

6. *United States v. Carolene Products Co.*, 304 U.S. 144 (1938). See also *Keyes v. School District No. 1, Denver, Colorado*, ..... U.S. ..... (June 21, 1973), and the opinion of Mr. Justice Stewart in *San Antonio Independent School District v. Rodriguez*, ..... U.S. ....., 93 S.Ct. 1278 (1973).

7. Those from Puerto Rico probably form the major exception; that Puerto Rico is not a "foreign country," however, should not affect the rights of Puerto Rican children.

8. This is not the same thing as a neighborhood school assignment policy which produces racial isolation. The link to race there is not inex-

That a singled out class of children with foreign lineage are in need of judicial solicitude requires little argument. A sorry blot on the history of this nation is the frequency of lesser treatment of those among us who are seen as "foreigners."[9] The hopelessness of expecting non-English speaking children themselves to bring about the needed change through the political process is evident. And to rely for political solutions on their parents, who themselves generally lack facility in the common language of political discourse in this land, is whimsical. In short, such children are a classic "suspect classification."[10]

**(3) The denial of public education to non-English speaking children is extraordinarily debilitating to them.** The bitter irony is that public school is that very place to which these children can reasonably look to overcome their inability to speak English. Indeed, language skills, particularly basic English skills,

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tricable. For example, one could reasonably expect that housing policy changes would alter such racially isolating effects, and indeed, housing policy may well be the appropriate manner in which to attack this problem. Language and national ancestry are inextricable. Mexico, for example, is not going to reject Spanish as its national language, and American public schools are the ideal place for dealing with Spanish-speaking, American children of Mexican ancestry. Hence, although we do not express an opinion on the constitutionality of so-called "pure de facto" school segregation, we do insist that this is a far easier case.

9. *Yick Wo v. Hopkins,* 118 U.S. 356 (1886); *Yu Cong Eng v. Trinidad,* 271 U.S. 500 (1926); *Korematsu v. United States,* 323 U.S. 214 (1944); *Graham v. Richardson,* 403 U.S. 365 (1971).

10. In *Hernandez v. Texas,* 347 U.S. 475, 478 (1954), the Court said:

> "Throughout our history differences in race and color have defined easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the laws. But community prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection. Whether such a group exists within a community is a question of fact. When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated."

are at the core of what schools do teach. To impose a requirement that a child already be educated in particular language skills *before* he can effectively participate in the educational program, makes a mockery of public education.

The denial of effective participation by these children in the educational process compromises their First Amendment rights in two separate ways.[11] First, and in general, the effective exclusion from schooling is harmful to the exercise of First Amendment rights because public school is that institution which we most heavily rely upon for the purpose of preparing the young so that they may exercise their free speech right, their right to vote and related rights. Second, and more specifically, if the schools do not teach these children to speak English, how can they be expected, as adults, to participate in and comprehend political debate or to deal with the English language ballot?

As to the social and economic harm that befalls these children, the Congressional Hearings which led to Title VII of the Elementary and Secondary Education Act amply illustrate their magnitude.[12]

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11. This case is clearly distinguishable from *San Antonio Independent School District v. Rodriguez*, ..... U.S. ....., 93 S.Ct. 1278 (1973), and indeed is supported by dictum therein. Here there is a readily identifiable class and there is, effectively, total deprivation. In other words, this is not a case in which the Court can say that plaintiffs at least are getting some "minimum" education; children who are left out of the educational program because of language barriers are not getting that "minimum."

12. See Hearings on S. 428 before the Special Subcommittee on Bilingual Education of the Senate Committee on Labor and Public Welfare, 90th Cong., 1st Sess., 46 (1967). Subsequent hearings on the educational problems of Chicanos, Puerto Ricans, and Indians also emphasize the severe social and economic disadvantages placed on non-English speaking children. See Special Subcommittee on Indian Education of the Senate Committee on Labor and Public Welfare, S. Rep. No. 501, 91st Cong., 1st Sess. (1969), and Hearings on Equal Educational Opportunity Before the Senate Select Committee on Equal Educational Opportunity, 91st Cong., 2d Sess., 2504 (1970).

**(4) Non-English speaking children who are left out of the educational program of the classroom are stigmatized and made to feel inferior.** If non-English speaking children are not integrated into a school district's educational program, their inability to speak English is a badge of inferiority. When the state compels the child to attend school, it may only justify this restraint on his liberty with the benefits of education. The non-English speaking child is confined to the classroom and is not benefited; that his liberty is so casually infringed is insulting.

These children, as testimony before Congressional committees shows, are not treated as exotic rarities, as might be an American professor's children when they are enrolled in Italian schools while the family spends a sabbatical year in Florence. The non-English speaking child in American schools is branded; that he cannot speak English is treated by the state as a mark of disgrace. The very manner in which the child speaks is held against him and is what excludes him from the educational program. Indeed, the whole class understands that the program is designed to teach some of the children but not others. This is like the state holding the color of your skin against you.[13] This is what it means to be "stigmatized."

It is not surprising that the child, lacking the sophistication to damn the system, views himself as wrong not wronged. If he cannot participate in the program, as he sees the other children doing, he reasons that it is his own fault. Not only is he burdened with an inability, but with a sense of shame for his inadequacy. If the Court of Appeals can imply that the child is at fault, surely it is not too much to imagine that the school itself conveys a like message to the child. This attitude, latent as it may well be, nevertheless confirms the child's diminished perception of his self-worth.

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13. In *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1947), the Court struck down separate treatment of a student who was in the same classroom. The Court found that this apartness denied the black, separated student the intangibles of education—the good opinion and the association of his fellow students.

The district's election not to teach him to speak English is also isolating. If language barriers are not removed, non-English speaking children are necessarily separated from their classmates. To be sure, it may be both stigmatizing and isolating to be taken aside and taught English when everybody else already knows how to speak English. But that separation is calculated to be temporary and hence will be far less severe than the effective isolation the district perpetuates by offering no such help.

Of course, we agree that the district has a very strong interest in seeing that a national origin group is not segregated. But this interest may not be interposed to close off special help to Chinese- or Spanish-speaking children. Physical integration, purely for its own sake, when effective classroom isolation occurs is not what the equal protection clause ever intended.[14] Finally, we respect the societal interest in having a single national tongue, but that interest is frustrated, not furthered, by failing to teach English to children who speak other tongues.

**(5) The school district may not justify its failure to take affirmative steps to integrate non-English speaking children into its educational program with arguments suggesting that it is not the school's job to teach children to speak English.** The school has a duty to teach children to speak English and may not leave it entirely to the family. It is unreasonable to expect children themselves to be responsible for assuring that they speak English by the time they start school. And it is highly unfair to punish children for the failure of their parents, particularly when their parents do not speak English. We do not disagree with those who believe that parents also owe duties to their children, but when the parents fail, the penalty should not be visited on the children.

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14. As to the importance of the public school system taking into account many other interests besides "integration for its own sake", see the opinion of Mr. Justice Powell in *Keyes v. School District No. 1, Denver, Colorado,* ..... U.S. ..... (June 21, 1973).

Since the foundation of future school learning is based on the ability to speak English, to fail to teach English on the grounds that it is the family's job, is an impermissibly constrained definition of the school role. It is inconsistent with the responsibility society has invested in the public education system. To allow the schools such a limited view of their undertaking is incompatible with society's past willingness to afford a great measure of independence to them with respect to the manner in which they deal with the young. Acting as though all children come to school in exactly the same condition and need exactly the same treatment is not only preposterous, but also dramatically unlike the way schools actually operate as a general matter.[15]

The attitude that immigrants to this country in years past have always "managed" and the accompanying disapproval of Mexican, Puerto Rican, Chinese and other children for asking the Supreme Court for help has a kind of smugness about it we find frightening. Given a sufficient number of generations most people will be assimilated; the rights of the current generation of children should not be sacrificed in the name of that eventuality. The patience that is thereby demanded is unsuited to today's world. Not only is education more important today than it has ever been in the past, but as a nation we are more intolerant of injustices to minorities, particularly children, than we have been in the past.

Finally, we chafe at treating this attitude toward those children who do not speak English as legitimate. It reflects the "rite of initiation" mentally that the equal protection clause was specifically designed to outlaw. Furthermore, if this attitude is not venal

15. Public schools generally offer a wide range of special educational programs to meet different (individual) needs. These include programs for educationally handicapped, emotionally disturbed, educable or trainable retarded, blind, deaf, physically handicapped, multihandicapped, and mentally gifted.

it is short sighted; the entire nation is the loser if these children are denied public education.[16]

**(6) The school district may not justify its failure to take affirmative steps to integrate non-English speaking children into its educational program with arguments about costs and cost effectiveness.** We wish to dispose at the outset of any suggestion that the school does not know how to teach these children to speak English. That the institution which teaches German, French, and Spanish easily enough, and offers "English" for all twelve grades could even suggest that it is unable to teach non-English speaking children to speak English is ludicrous on its face. Moreover, such a claim is simply false since known and effective techniques for teaching English do exist. The availability of such techniques alone is convincing evidence to counter any further suggestion that it would be futile to try to teach such children. We do not anticipate, however, that the school districts would make such simplistic arguments. Rather, more sophisticated assertions might be expected.

One such argument is that "affirmative steps" do not help children to learn English any faster than when they are ignored and hence such steps are a waste of money. It is not beyond comprehension for this to be true, although it is a sad comment on school effectiveness. However, it is an argument which we submit the school district has the burden of proving. Since both Congress and the Department of Health Education and Welfare have concluded that affirmative steps are needed and have called upon school districts to take them, it is at least a rebuttable presumption that such steps are helpful.[17]

A different argument is that it costs money to take affirmative steps, money which the district does not have. It seems to us that

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16. See especially *Abington School District v. Schempp*, 374 U.S. 203 (1963), concurring opinion by Mr. Justice Brennan at 230.

17. *Cf. Griggs v. Duke Power Company*, 401 U.S. 424 (1971); and *Keyes v. School District No. 1, Denver, Colorado*, ..... U.S. ..... (June 21, 1973).

a more valid characterization of the situation is that the school district is wasting money by having these children in programs they cannot comprehend and that such money could be far better employed in teaching them English.

Indeed, one of the mysteries is why a school district does not do precisely this, particularly when it has among its pupils what amount to classrooms full of non-English speaking children. The answer, it seems, is that the districts already have on their payrolls people who are not trained to teach such children, and they feel politically constrained not to replace such teachers (many of whom are tenured) with those who are so trained. Moreover, declining enrollment in many cities means that there are few, if any, positions opening up through attrition. We by no means insist that teachers must be replaced. We do submit, that a district may not refuse to retrain them, or hire additional English teaching specialists or do whatever else may be appropriate by hiding behind the "no money" claim. School districts have taxing power and resources which they are presently employing for the purpose of educating English speaking children. Relief should not be viewed as something which necessarily requires extra funds for non-English speaking children; rather it is that a fair share of the district's funds, whatever their amount, should be employed for their benefit. To say simply that there is "no money" for those who are effectively denied education is ultimately, therefore, as unjustifiable as asserting lack of money as the reason for continuing to refuse entry to children previously unconstitutionally barred at the door.

Finally the school district might assert that the cost of doing anything very helpful for non-English speaking children is unreasonably high; by that it would mean either that taxpayers would be unreasonably burdened or other children would be unreasonably harmed from having resources shifted away from

them. Were this argument something the school district could "prove" and not merely "assert", then it would be an effective argument. We are not asking the school district to do what is unreasonable to do. But we believe the burden of proving such an assertion is justly on the school district in view of the facts that (a) this is a matter involving a suspect classification, (b) the interest involved—public education—is so important, (c) Congress and HEW have already concluded that it is important to take affirmative steps to help such children, and Congress is providing help to districts to meet their obligations.[18]

**(7) A constitutional requirement that school districts take affirmative steps to integrate non-English speaking children into their educational program is neither a judicially unmanageable command nor an empty gesture.** Since we claim that constitutional rights are being violated, it is important that the duty imposed on school districts be reasonably calculated to terminate the denial of such rights. Moreover, school districts are entitled to have some idea what is meant by the phrase "affirmative steps." And this Court is entitled to some explanation of how representatives of non-English speaking children and school districts (and ultimately federal district courts) are to resolve disputes which are bound to arise over whether the school district has taken "affirmative steps" when it claims to have. This section addresses these matters.

Essentially, we submit, the test is whether the school district, in light of all the facts and circumstances, is making a reasonable effort to educate non-English speaking children when compared with the effort made for those who do speak English. Such an effort would be an enormous gain for non-English speaking children.

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18. In fact, teaching non-English speaking children is, fortunately, not a terribly expensive proposition; it does not involve the same costs as might be involved in teaching autistic children, for example.

A "reasonableness" standard is one which people understand. It also is familiar judicial standard, in both common law and constitutional litigation. And like the prohibition against unreasonable searches and seizures certain rules can be worked out. For example, the half-way measure of providing English instruction to some non-English speaking children in the district but not to others, in the absence of special circumstances that might explain this, would not constitute "affirmative steps"—that is, it would not display reasonable effort to educate the ignored children.

The "reasonableness" standard does not, however, include any specific pedagogic content. It will not matter constitutionally whether a school district chooses (1) to devote itself to teaching non-English speaking children to speak English with the idea that they will soon be able to participate in regular classes or (2) to teach various skills to non-English speaking children in the language they already speak, while more slowly teaching them to speak English, or (3) to train regular classroom teachers to involve the class in the English teaching of the non-English speaking children, simutaneously with the carrying out of the general education of the entire class, or any number of possible approaches.

Indeed, once the school district has a program reasonably calculated to educate all of its children, a federal district court, we think, should defer to the professional judgment of the district, unless it can be shown that the "program" is a sham so far as non-English speaking children are concerned. We want to emphasize that the "reasonableness" test does not require success. That is, the school need not do whatever is necessary to assure that formerly non-English speaking children do as well on standard school achievement tests as do children who come to school speaking English. Nor must the school assure that all the non-English speaking children in fact are speaking English by a certain

date. Its efforts will be gauged in terms of imputs—the offering made available to these children; does that offering display the kind of effort that is made for those who do speak English?

Once such a constitutional command exists, and so long as the power of the federal courts remains available to deal with unreasonable school districts, it is fair to rely largely on the political process to develop programs from place to place. Along these lines, however, we would think that a district could expect that its actions would more easily be judged as reasonable were it to involve representatives of non-English speaking children in the planning of their educational program.

**(8) Vindication of the constitutional rights of non-English speaking school children should not be thwarted by fears of an uncontrollable flood of litigation brought by non-English speaking persons in other areas.** If anything, a decision in favor of non-English speaking school children will limit the pressure for other such cases. That is, to insist that the public schools take responsibility for teaching English to the young is the single most promising thing that can be done to assure access to the rights and liberties from which people now find themselves cut off because of language barriers.

In the meantime, when government action operates to injure persons who do not speak English, a careful examination will be required in each case. This is the meaning of the "strict scrutiny" standard as applied to cases involving "suspect classifications." This Court is already quite familiar with applying the standard to superficially neutral rules that single out the poor[19] or blacks,[20]

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19. *Cf. Griffin v. People of the State of Illinois,* 351 U.S. 12 (1956); *Boddie v. State of Connecticut,* 401 U.S. 371 (1971); and *U.S. v. Kras,* ..... U.S. ....., 93 S.Ct. 631 (1973).

20. *Cf. Hunter v. Erickson,* 393 U.S. 385 (1969); *Jefferson v. Hackney,* 406 U.S. 535 (1972); and *Griggs v. Duke Power Co.,* 401 U.S. 424 (1971). As to Chinese-speaking people, see *Yu Cong Eng v. Trinidad,* 271 U.S. 500 (1926).

and hence should feel confident about its ability to apply it to cases involving non-English speaking persons.

For example, the Constitution may require that a non-English speaking criminal defendant have the services of an interpreter at a trial,[21] and that a non-English speaking voter be able to bring an interpreter into the voting booth with him.[22] However, if the booklet given to prospective drivers containing the "rules of the road" is printed only in English, this would not seem to rise to the level of a constitutional violation.[23]

As we have argued throughout, since education is so important to children and since public schools are so naturally suited to take the needed action to provide such education to non-English speaking children, the denial of such education on account of language barriers must be precluded by the Constitution.[24]

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21. *Cf. Negron v. New York*, 434 F.2d 386 (2nd Cir., 1970).

22. *Cf. Garza v. Smith*, 320 F. Supp. 131 (W.D. Tex., 1970); *Puerto Rican Organization for Political Action v. Kusper*, 350 F. Supp. 606 (N.D. Ill., 1972).

23. On the other hand, if the examination needed to obtain the driving license is only given in English, then the constitutional outcome to a challenge to that practice would depend, among other things, upon the fact that adults are involved, and upon both how important the Court really thinks access to a driving license is, and how reasonable it is to require an understanding of English as a precondition to driving, in the interest of the safety of others. See *Bell v. Burson*, 402 U.S. 535 (1971).

24. Although we have argued this case as a denial of "equal protection" which we think is the best analysis, we believe that it is also well phrased as (1) a denial of "substantive due process"—when children are compelled to attend school they have a right to treatment, not confinement, see, e.g., *Wyatt v. Stickney*, 325 F. Supp. 781 (N.D. Ala., 1971); or (2) a denial of "procedural due process"—the state has conclusively presumed that those children who do not speak English are not deserving of education, see e.g., *Vlandis v. Kline*, 41 L.W. 4796 (June 12, 1973), *Stanley v. Illinois*, 405 U.S. 645 (1972), and *Bell v. Burson*, 402 U.S. 535 (1971).

### III. In the Case Before the Court Petitioners' Constitutional Rights Have Been Violated.

A final question is whether or not, on the record before the Court, it can be determined if petitioners' constitutional rights have been violated. We assert that a determination can be made and that the defendant school district has violated their rights. We point to two things in support of this. First, the defendant school district admits that it does the "same thing" for these non-English speaking children as it does for the rest of its children; indeed, that is how it attempts, unsuccessfully, to argue that "state action" is missing. This admission reveals a failure to show the same degree of concern for the petitioners' education as that shown for other children in the district. Second, the defendants admit that petitioners need help in English, that others who have similar problems are getting such help, but that petitioners are not getting such help. That also bespeaks of a failure to be concerned about their education.

## CONCLUSION

For the reasons given, we respectfully urge that the decision of the Court of Appeals be reversed.

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